82-1965

No. _____

Office-Supreme Court, U.S.
FILED
MAY 31 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

FRANCES WYNSHAW,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Warren Douglas Wynshaw
STERN and WYNSHAW
Attorneys for Petitioner
Frances Wynshaw
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QUESTIONS PRESENTED

I. Whether the Court of Appeals denied Frances Wynshaw her due process rights and her right to a trial in denying Frances Wynshaw's petition for rehearing and in denying her motion for leave to file addenda of documents outside the record on appeal.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendments 5 and 7.

JURISDICTION

Jurisdiction of this Court is based upon 28 U.S.C. § 1254 (1).

OPINIONS IN COURTS BELOW

The opinions in the courts below may be found reprinted in the Appendix at pp.15 through 48. The order denying the petition for rehearing is published at —— F. 2d --- (2d Cir. 1983) and is reprinted in the Appendix at page 15. The opinion of the Court of Appeals affirming the District Court is published at 697 F.2d 85 (2d Cir. 1983) and is reprinted in the Appendix at page 19. The memorandum and opinion of the

District Court is published at 516 F. Supp. 785 (S.D.N.Y. 1981) and is reprinted in the Appendix at page 31.

STATEMENT OF THE CASE

A 1972 joint tax return purportedly signed by David Wynshaw and Frances Wynshaw was filed with the Internal Revenue Service ("IRS") and the liability shown on the return was not paid nor was the assessment paid.

The IRS issued a Notice of Deficiency for allegedly underreporting taxable income for four years and included the 1972 return.

The Wynshaws petitioned the Tax Court for a redetermination of the deficiency and Frances alleged that she was an "innocent spouse" under 26 U.S.C. § 6013 (e) claiming that she should not be liable for any deficiency because "in signing the returns for the years in question [she] had no reason to know of such omissions."

The United States instituted an action in the United States District Court for the Southern District of Florida to reduce to judgment federal income tax assessments against defendants, then

husband and wife, for the income tax liability reflected in a 1972 tax return which was allegedly filed jointly. Partial default judgment was entered against David Wynshaw. Upon motion, the action was transferred to the United States District Court for the Southern District of New York.1

Frances Wynshaw interposed an answer which alleged an affirmative defense that her signature does not appear on the tax return for the year in question, and she served a notice to produce said return.

The United States moved for summary judgment on the grounds that res judicata bars defendant from litigating the issue as to the liability shown on the return because a stipulated decision previously had been entered

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1 The parties to the suit were the United States of America, Plaintiff against David Wynshaw and Frances Wynshaw. Jurisdiction was conferred by virtue of 26 U.S.C. § 7402, 28 U.S.C. §§ 1340 and 1345.

into in the Tax Court by the defendant and the Government wherein it was determined that defendant Frances did not owe any deficiencies for the year 1972. Frances cross-moved for summary judgment.

The District Court (Cannella, J.) granted plaintiff's motion for summary judgment, and denied defendant's cross-motion for summary judgment.

Defendant Frances Wynshaw timely appealed from that order and judgment.

In its answering brief, the government, in addition to conceding Frances' position that res judicata did not apply, set forth three new grounds upon which the District Court decision could be affirmed: judicial estoppel, equitable estoppel, and ratification of the signature.

The Court of Appeals affirmed the decision of the District Court on different grounds. The Court held that Frances is precluded from raising the affirmative defense

that she did not sign the return on the grounds of equitable estoppel. The Court said that the doctrine applies when a

> "taxpayer, by his conduct, which includes language, acts or silence, knowingly makes a representation or conceals material facts when he intends or expects will be acted upon by taxing officials in determining his tax."

The Court stated that the IRS relied on Frances' statment in the Tax Court petition.

Frances filed a petition for rehearing stating that the Court of Appeals overlooked the point raised in the reply brief that prior to the termination of the Tax Court proceeding, Frances had told the government that she had not signed the return for 1972. That statement was made in the settlement discussions had with the government after the petition was filed.

Because the issues presented by the United States in its answering brief were not raised in the District Court in the motion for summary judgment, the full text of an IRS Memorandum and affidavit supporting Frances'

petition could not be presented to the court nor could the appended documents which were not part of the record in the District Court. In Frances' reply brief, note was made that there were documents outside the record which were dispositive of the issues raised, and that for a full hearing to be had on the issues raised in the answering brief, those issues should be remanded to the District Court for review.

Frances' motion for leave to file addenda of documents outside the record on appeal with the petition for rehearing was denied, and the Court of Appeals denied Frances' petition for rehearing.

I

WHETHER THE COURT OF APPEALS DENIED FRANCES WYNSHAW HER DUE PROCESS RIGHTS AND HER RIGHT TO A TRIAL BY DENYING HER PETITION FOR REHEARING AND BY DENYING HER MOTION FOR LEAVE TO FILE ADDENDA OF DOCUMENTS OUTSIDE THE RECORD ON APPEAL.

This is America. What American shall be denied his day in court? Shall the petitioner Frances Wynshaw? If so, why? Who is she? She is now known as Frances March, a plain ordinary everyday type of garden variety American woman who has borne three children.

She was married to David Wynshaw. Who is he? What has he done to create this problem for her? He was found guilty of tax evasion and sentenced. He forged her name to tax returns. She has and continues to pay her taxes. She has been and continues to be her sole means of support. Since being divorced, and previous thereto, she had to have a job to earn her daily bread. She does not receive any sort of support

from her former husband.

A notice of deficiency, for a massive sum of money, was issued. A petition with the Tax Court of the United States was filed by her. A conference was held with the Appelate Division of the Internal Revenue Service. It was there determined that she was an innocent spouse. It was further determined that several of the returns in question were not signed by her. One of those being the return for the year here in question. This was the first time that the Internal Revenue Service honored the request to produce the returns to ascertain whether or not she had signed them. Previously the Internal Revenue Service did not comply with this request.

With the Statute of Limitations about to run out the United States served her with process. Service was made in Florida. She never lived in Florida. Her former husband did and still does.

In the United States District Court for

the Southern District of New York Judge Cannella granted the motion of the United States for a summary judgment. As a result she owes a tax that she cannot pay. She had no income for the year. Her name was forged to the return sued upon. How can she owe such a tax? The Judge reasoned res judicata. Certainly. Why was not the agreement reached with the Appellate Division of the Internal Revenue Service deciding that she had no income and that her name was forged to the return not a part of the record? There was some sort of slip up. This was not occasioned by her. Had there been a trial she could have proved to the satisfaction of the Court and to all concerned that she had no income and that her name was forged.

The Court of Appeals for the Second Circuit affirmed the result in the District Court, albeit for a different reason. The Court reasoned equitable estoppel. The Court accepted the fact that she had no income, and that her

name was forged. However, she should have said this earlier so that the claim of the Internal Revenue Service against her former husband would have been in a larger amount. She did say earlier, at the conference with the Appellate Division of the Internal Revenue Service, that she had no income and that her name was forged. In a practical sense the massive sum of money due from her former husband to the Internal Revenue Service will never be liquidated whether for a greater or a lesser sum. He is past the age of 62, and has had heart surgery. His years of high earning power are gone, and what opportunity he had went up in smoke when he was sent to the Federal penitentiary for income tax evasion.

At her earliest opportunity she told the Internal Revenue Service that she had no income and that her name was forged. Today she is compelled to come to this august Court to ask that an elementary principle of justice be enforced. In the words of Oliver Twist, Please,

may she have her day in court? She begs that she be allowed to tell her story knowing that in this way justice shall be served. In this way, and only in this way, can she be saved from what might be considered small potatoes by some. But, to her the burden being forced upon her is mountainous. So much so that it will prove to be ruinous.

She prays to God, and implores this mighty Court that she may have her day in court so that justice may be served, and she may be permitted to correct this error, and so be vindicated.

Respectfully submitted,

STERN and WYNSHAW
Attorneys for
Petitioner

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APPENDICES

APPENDICES

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COURT OF APPEALS ORDER
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UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-eighth day of January, one thousand nine hundredand eighty-three.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. No. 82-6217

DAVID WYNSHAW, FRANCES WYNSHAW,

Defendants,

FRANCES WYNSHAW,

Defendant-Appellant.

A petition for rehearing having been filed herein by counsel for the defendant-appellant, Frances Wynshaw,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. Daniel Fusaro, Clerk
by

/s/ Francis X. Gindhart
Francis X. Gindhart
Chief Deputy Clerk

COURT OF APPEALS ORDER DENYING
MOTION FOR LEAVE TO FILE ADDENDA
OF DOCUMENTS OUTSIDE THE RECORD ON APPEAL

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-V-

FRANCES WYNSHAW,

Defendant-Appellant.

Docket No.
82-6217

NOTICE OF MOTION FOR LEAVE TO FILE ADDENDA OF DOCUMENTS OUTSIDE THE RECORD ON APPEAL

* * *

IT IS HEREBY ORDERED that the motion for leave to file addenda of documents outside the record on appeal with the petition for rehearing be and it hereby is denied.

/s/ Henry J. Friendly
Hon. Henry J. Friendly

/s/ William H. Timbers
Hon. William H. Timbers

/s/ Ralph K. Winters
Hon. Ralph K. Winters, CJJ

May 4, 1983
Date

COURT OF APPEALS DECISION AFFIRMING DISTRICT COURT ORDER GRANTING SUMMARY JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 597—August Term, 1982

(Argued December 13, 1982 Decided January 6, 1983)

Docket No. 82-6217

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-V.-

DAVID WYNSHAW, FRANCES WYNSHAW,

Defendants,

FRANCES WYNSHAW,

Defendant-Appellant.

Before:

Friendly, Timbers, and Winter,

Circuit Judges.

Appeal from a grant of summary judgment by the United States District Court for the Southern District of New York, John M. Cannella, Judge, reducing to judgment a $9,619.64 federal income tax assessment against appellant. The District Court's opinion is reported at 516 F. Supp. 785 (S.D.N.Y. 1981).

We affirm on different grounds than those espoused by the District Court.

WARREN D. WYNSHAW, NEW YORK, NEW YORK (Stern and Wynshaw, New York, New York) for Appellant.

THOMAS D. WARREN, ASSISTANT UNITED STATES ATTORNEY, Southern District of New York (John S. Martin, Jr., United States Attorney, Southern District of New York, David M. Jones, Thomas D. Warren, Assistant United States Attorneys, of counsel), for Appellee.

Per Curiam:

In October 1973, a joint tax return for the year 1972, purportedly signed by David and Frances Wynshaw, was filed with the Internal Revenue Service. ("I.R.S."). That return showed a tax liability for the couple of $10,368.65;1 however, no payment was enclosed. On January 7, 1974 the I.R.S. assesed the unpaid balance jointly against the taxpayers.

On October 14, 1976, the I.R.S. sent the Wynshaws a Notice of Deficiency for four tax years, including 1972. According to the Notice, the Wynshaws had underreported their 1972 taxable income by more than $117,000.00 and were jointly liable for another $76,727.00 in federal taxes for that year. The Service also notified the Wynshaws that they owed an additional $241,457.00

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1 The disparity between the $10,368.65 and the $9,619.64 currently claimed by the I.R.S. is due to certain additional deductions allowed by the Service in recomputing the 1972 return.

due to underreported income for the years 1969-71.

On January 3, 1977, the Wynshaws petitioned the Tax Court for a redetermination of deficiency. In the joint petition, Frances invoked the "Innocent Spouse" provision of the Internal Revenue Code, 26 U.S.C. § 6013 (e)

(1976)2 claiming that she should not be liable for the tax liability demanded by the I.R.S. because she had not been aware of nor benefitted from the omissions that created the liability. That petition stated, "The Petitioner, Frances

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2 (e) Spouse relieved of liability in certain cases.—
(1) In general.—Under regulations prescribed by the Secretary if—
(A) a joint return has been made under this section for a taxable year and on such return there was omitted from gross income an amount properly includable therein which is attributable to one spouse and which is in excess of 25 percent of the amount of gross income stated in the return,
(B) the other spouse establishes that in signing the return he or she did not know of, and had no reason to know of, such omission, and
(C) taking into account whether or not the other spouse significantly benefited directly or indirectly from the items omitted from gross income and taking into account all other facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such omission, then the other spouse shall be relieved of liability for tax (including interest, penalties and other amounts) for such taxable year to the extent that such liability is attributable to such omission from gross income.
(2) Specials rules. -For purposes of paragraph (1)--(A) the determination of the spouse to whom items of gross income (other than gross income from property) are attributable shall be made without regard to community property laws, and
(B) the amount omitted freom gross income shall be determined in the manner provided by section 6501(e)(1)(A).

Wynshaw, was innocent of such omissions, if any, and in signing the returns for the years in question had no reason to know of such omissions." (Emphasis added).

On August 21, 1979, the Wynshaws and the I.R.S. entered into a stipulated judgment. The Service accepted Frances Wynshaw's innocent spouse argument while David agreed to be responsible for specified deficiencies and penalties.

None of the arrears or penalties contained in the 1979 stipulation or the $9,619.64 due under the 1972 return have been paid. In order to reduce both assessments to judgment within the six year time limitation imposed by 26 U.S.C. § 6502(a)(1), the I.R.S. filed suit on January 2, 1980 to secure payment from David of the agreed upon penalties and deficiencies and to hold David and Frances jointly and severally liable for the $9,619.64 still due on the 1972 return.

Frances, now divorced from David, responded by raising the affirmative defense that the signature on the 1972 tax return was not hers and had not been authorized. Ruling on cross-motions for summary judgment, Judge Cannella held that Frances' statements in her 1977 petition to the Tax Court did not constitute a formal admission that she had signed the 1972 tax return for purposes of this litigation. Instead, he held that the Tax Court's acceptance of the 1979 stipulation was a judgment deciding the "'entire gamut of possible issues that [control] the determination of the amount of tax liability for the year in question.'" 516 F.Supp. at 789 (quoting Russell v. United States, 592 F.2d 1069, 1072 (9th Cir.), cert. denied, 444 U.S. 946 (1979)). Because Frances had failed to deny the authenticity of the signature on the 1972 return before the Tax Court, Judge Cannella held that she was precluded by res judicata from raising it here. He therefore granted the

Government's motion for summary judgment.

However, the Government now concedes that the principles of res judicata do not apply. The Tax Court's jurisdiction is limited to the redetermination of a "deficiency" or the determination of an "overpayment." 26 U.S.C. § 6512(b)(1)(1976). Because the $9,619.64 liability was neither a deficiency, since it was reflected on the 1972 return, nor an overpayment, since it was never paid, it was not properly within the Tax Court's jurisdiction in 1977. In effect, the present action is a separate cause of action for purposes of res judicata.

Nevertheless, we hold that Mrs. Wynshaw is precluded from raising the affirmative defense on grounds of equitable estoppel. That doctrine applies when "[t]he taxpayer, by his conduct, which includes language, acts or silence knowingly makes a representative or conceals material facts which he intends or expects will be acted upon by taxing officials in

determininghis tax." Robinson v. Commissioner, 100 F.2d 847, 849 (6th Cir.), cert. denied, 308 U.S. 567 (1939); cf. United States v. Matheson, 532 F.2d 809, 819 (2d Cir.), cert. denied, 429 U.S. 823 (1976)); Kurz v. United States, 156 F. Supp. 99, 106 (S.D.N.Y. 1957), aff'd on opinion below, 254 F.2d 811 (2d Cir. 1958). In the present case, the I.R.S. relied on Frances' 1977 statement that she had signed the 1972 return when computing the tax due on David Wynshaw's unreported income. The Service calculated the amount due on the Wynshaws' revised taxable income for 1972 based on the tax rate for married individuals filing jointly. Had the Service used the rate for married individuals filing separately, as would have been proper had Mrs. Wynshaw not signed or authorized the return, the Tax Court judgment, including fraud penalties, would have been $21,301.00 more than it was under the calculation for married individuals filing a joint return. Thus, if Mrs. Wynshaw's present

claim is true, she knowingly made a material misrepresentation of fact in her 1977 petition upon which the I.R.S. foreseeably relied to its detriment, thus fulfilling the textbook definition of equitable estoppel. Although not necessary to a finding of estoppel, it is also clear that Mrs. Wynshaw stood to benefit from her misrepresentation since she was married to David Wynshaw at the time and benefitted from an improvement of his financial position.

Thus, Mrs. Wynshaw's admission of liability as represented by her signed 1972 income tax return is valid and, no material issues of fact existing, the government is entitled to summary judgment reducing the assessment on that return to a judgment against her.

Affirmed.

COURT OF APPEALS JUDGMENT AFFIRMING
DISTRICT COURT ORDER GRANTING SUMMARY JUDGMENT

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the sixth day of January, one thousand nine hundred and eighty-three.

Present:

HON: HENRY J. FRIENDLY

HON: WILLIAM H. TIMBERS

HON: RALPH K. WINTER

Circuit Judges

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

V.

DAVID WYNSHAW, FRANCES WYNSHAW, Docket No.

Defendants, 82-6217

FRANCES WYNSHAW,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. Daniel Fusaro, Clerk

by /s/ Arthur Heller

Arthur Heller
Deputy Clerk

DISTRICT COURT MEMORANDUM AND
ORDER GRANTING SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

FRANCES WYNSHAW,

Defendant.

MEMORANDUM AND ORDER

80 CIV. 4941 (JMC)

CANNELLA, D.J.:

Plaintiff's motion for summary judgment is granted. Fed. R. Civ. P. 56.

Defendant's cross-motion for summary judgment is denied. Fed. R.Civ. P. 56.

FACTS

The Government commenced this action on January 2, 1980 in the United States District

Court for the Southern District of Florida, seeking to reduce to judgment federal income tax assessments against defendant Frances Wynshaw in the amount of $9,619.64, the income tax liability reflected in a 1972 tax return which defendant allegedly filed jointly with her husband, David Wynshaw. See I.R.C. § 7402. On July 31, 1980, the action was transferred to this Court pursuant to 28 U.S.C. §§ 1404, 1406.

In October 1973, the tax return at issue was filed showing a joint tax liability for 1972 of $16,748.31.1 Notice of Motion, Exhibit A (filed Nov. 7, 1980). Subsequently, the Internal Revenue Service ["IRS"] issued a notice of deficiency to defendant and her husband in the amount of $318,184, plus additions applicable

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1 Spouses are jointly and severally liable for tax liabilities when filing jointly. I.R.C. § 6013 (d) (3). The IRS has credited certain amounts to the tax liability set forth in the 1972 tax return, reducing the balance of the assessment to $9,619.64 as of April 15, 1974. See Notice of Motion, Exhibit E (filed Nov. 7, 1980).

only to David, for 1969, 1970, 1971 and 1972. Id., Exhibit B.[2] Frances and David then filed a timely pro se petition in United States Tax Court for a redetermination of the alleged deficiency. Id., Exhibit C.[3] In that petition, defendant claimed that she was not liable for the deficiency under the so-called "innocent spouse"

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2 The procedures for the issuance of a notice of deficiency are set forth in I.R.C. § 6212.

3 Frances and David followed the procedures set forth in I.R.C. § 6213.

provision of the tax code,4 stating she "was innocent of [the omissions of unreported income for the years 1969 through 1972], if any, and in signing the returns for the years in question had no reason to know of such omissions." Id., ¶ 5 (i). The proceedings were terminated when David and Frances, who were then represented by counsel, and the Government entered into a stipulated decision which, by agreement between

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4 I.R.C. § 6213 (e) (1) provides:

[I]f—

(A) a joint return has been made under this section for a taxable year and on such return there was omitted from gross income an amount properly includable therein which is attributable to one spouse and which is in excess of 25 percent of the amount of gross income stated in the return,

(B) the other spouse establishes that in signing the return he or she did not know of, and had no reason to know of, such omission, and

(C) taking into account whether or not the other spouse significantly benefited directly or indirectly from the items omitted from gross income and taking into account all other facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such omission, then the other spouse shall be relieved of liability for tax (including interest, penalties and other amounts) for such taxable year to the extent that such liability is attributable to such omission from gross income.

the parties, became the decision of the Tax Court.[5] It provides: "[T]here are no deficiencies in income taxes due from . . . petitioner Frances Wynshaw for the taxable years 1969, 1970, 1971 and 1972." Id., Exhibit D.

DISCUSSION

Defendant does not dispute the government's contention that a 1972 Tax Return, on which her name appears, was filed, or that the outstanding tax liability for that return as of April 15, 1974 is $9,619.64. Rather, she contends that she had no taxable income in 1972, and consequently did not sign or file a return for that year or authorize anyone to sign or file a return on her behalf. See Affidavit of Frances March, f/k/a Frances Wynshaw, ¶ 2 (filed Jan. 29, 1981). She claims further that at the time of the tax court proceeding she did not even know

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5 The decision was not appealed.

that a return for 1972 had been filed purporting to be hers. See Defendant's Memorandum of Law at 3 (filed Jan. 29, 1981). Therefore, defendant argues that she cannot be held liable for the tax stated to be due and owing therein.

The Government's argument is two-fold: first, it contends that defendant's statement in paragraph 5(i) of the tax court petition that "in signing the returns for the years in question [I] had no reason to know of such omissions," constitutes a judicial admission which is conclusive on the issue of whether she signed the 1972 return; second, it contends that the doctrine of res judicata bars defendant from litigating this issue since her denial of having signed the return is a defense that might have been offered to sustain her demand for a redetermination of the deficiency in the Tax Court. The Court disagrees with the Government on the first point, but finds that the doctrine of res judicata bars defendant from litigating

her tax liability for 1972.

Although defendant's above-quoted statement is certainly a damaging admission against her interest in this action, it was made in a pleading in a prior litigation and thus is merely an "ordinary" admission in the current llitigation. As such, it is not conclusive and, if the case were to proceed to trial, would be subject to explanation or contradiction. See Fidelity & Deposit Co. v. Hudson United Bank, 493 F. Supp. 434 (D.N.J. 1980); Donald M. Drake Co. v. United States, 153 Ct. Cl. 433 (1961).

The applicability of res judicata in the context of federal income tax litigation was addressed by the Supreme Court in Commissioner v. Sunnen, 333 U.S. 591 (1948). The Court stated:

> The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only

as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." Cromwell v. County of Sac, 94 U.S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See Von Moschzisker, "Res Judicata," 38 Yale L. J. 299; Restatement of the Law of Judgments, §§ 47, 48.

But where the second action between the same parties is upon a different cause or demand, the principle of res judicata is applied much more narrowly. In this situtation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." Cromwell v. County of Sac, supra, 353. And see Russell v. Place, 94 U.S. 606; Southern Pacific R. Co. v. United States, 168 U.S. 1, 48; Mercoid Corp. v. Mid-Continent Co., 320 U.S. 661, 671. Since the cause of action involved in the second proceeding is now swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, res judicata is usually and more

> accurately referred to as estoppel by judgment, or collateral estoppel. See Restatement of the Law of Judgments, §§ 68, 69, 70; Scott, "Collateral Estoppel by Judgment," 56 Harv. L. Rev. 1.
>
> These same concepts are applicable in the federal income tax field. Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year. But if the later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as a collateral estoppel only as to those matters in the second proceeding which were actually presented anbd determined in the first suit. Id. at 597-98 (emphasis added); see Moyer v. Mathas, 458 F. 2d 431, 434-35 (5th Cir. 1972); Roberts v. United States, 423 F. Supp. 1314 (C.D.Cal. 1976); United States v. Sawyer, 243 F. Supp. 462 (D. Mass. 1965).

The first question, then, is whether the Tax Court's decision was a final judgment on the merits. As noted previously, the Tax Court proceeding involving defendant was terminated by stipulation, which became the decision of the Tax Court by agreement of the parties. Under the case law, such a decision is deemed to be a final

judgment on the merits. See United States v. International Building Co., 345 U.S. 502, 506 (1953); Stetson v. United States, 77-2 U.S.T.C. (CCH) ¶ 9663, at 88,238 (W.D.N.Y. 1977); Sylk v. United States, 331 F. Supp. 661, 666 (E.D. Pa. 1971).

Next, the Court must determine if the instant proceeding involves the same cause of action as that litigated in the Tax Court proceeding. Defendant claims that this litigation "is upon a different cause or demand," Commissioner v. Sunnen, supra, 333 U.S. at 597, so that res judicata does not apply, since the Tax Court proceeding determined the issue of tax deficiencies, while the instant litigation will determine the issue of whether she owes any taxes at all for 1972. Defendant relies upon the distinction between a deficiency, which is the difference between the amount of tax actually due and owing to the Government and the amount shown on the return itself as being due and owing, see

I.R.C. § 6211 (a), and the tax liability shown on the return alone. By defending this action on the ground that she had no taxable income in 1972 and did not sign or file a return for that year, defendant claims she is not attempting to relitigate the deficiency issue. She argues further that collateral estoppel likewise does not apply under these circumstances since that doctrine would apply only to points which were in issue in the Tax Court proceeding and upon which that court's decision was rendered. See id. at 598. In short, defendant contends that since both sides acknowledge that the only issue previously considered on the merits was whether she was an "innocent spouse" with respect to tax deficiencies, the Tax Court decision can have no effect on the instant litigation.

Although the Supreme Court in Sunnen did not fully explain the meaning of "cause of action" in federal tax litigation, two circuit courts of appeal have recently done exactly that.

In Russell v. United States, 592 F.2d 1069 (9th Cir.), cert. denied, 444 U.S. 946 (1979), the Ninth Circuit found that when a taxpayer petitions the Tax Court to redetermine an asserted deficiency, the Tax Court has "jurisdiction to decide the entire gamut of possible issues that [control] the determination of the amount of tax liability for the year in question." Id. at 1072. The court held, therefore, that the Tax Court's decision was res judicata as to all such issues. Id. Even more recently, the Fifth Circuit found that

> [i] in federal tax litigation one's total income tax liability for each taxable year constitutes a single, unified cause of action, regardless of the variety of contested issues and points that may bear on the final computation. As in any other area, res judicata bars subsequent litigation of a previously adjudicated cause of action, including thos claims and defense that could have been, but were not, raised in the earlier proceeding. All such issues are considered to have merged into the prior judgment.

Finley v. United States, 612 F.2d 166, 170 (5th Cir. 1980) (citations omitted).

Applying these principles to this case, it is clear that summary judgment for the Government is appropriate. Defendant is now attempting to litigate an issue which is without doubt a matter that could have been offered to challenge the deficiency assessment in Tax Court. Her claim that this issue could not have been litigated because at the time she did not know that a return for 1972 had been filed and that therefore no issue as to whether she signed the return existed is absurd in light of the undisputed facts.[6] The petition for redetermination was made in response to the IRS's notice of deficiency which specifically identified the tax returns at issue. It certainly was within defendant's knowledge at

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6 Defendant relies on Blackmon & Assocs. v United States, 409 F. Supp., 1264 (N.D. Tex. 1976), in which the issue sought to be litigated in the subsequent proceeding arose entirely after the prior judgment. If that were the case herein, res judicata would not apply. For the reasons stated below, however, this is not the case.

that time whether she signed one of those returns, and if indeed she did not, she had a fundamental and dispositive defense to the deficiency assessment as well as to the underlying tax liability reflected in the 1972 return. Therefore, the issue did exist and could have been litigated.7

CONCLUSION

Accordingly, plaintiff's motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied. Fed. R. Civ. P. 56.

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7 In light of the foregoing, defendant's cross-motion for summary judgment must of course also be denied. Even if the Court fhad denied the Government's motion, however, the Court would still deny defendant's motion. Defendant admits that her case is based upon her present statement that she did not have any income in 1972, did not sign or file a return and did not authorize anyone to do so for her. Since defendant's version of the facts is clearly at odds with her admission in the Tax Court petition, a resolution of the issue depends upon an assessment of credibility which is never appropriate for resolution on a motion for summary judgment.

Submit Judgment on Notice.

SO ORDERED.

/s/JOHN M. CANNELLA
JOHN M. CANNELLA
United States District Judge

Dated: New York, New York
June 29, 1981

DISTRICT COURT ORDER AND
JUDGMENT GRANTING SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-v-

FRANCES WYNSHAW,

Defendant.

ORDER AND JUDGMENT

80 Civ. 4941 (JMC)

Plaintiff United States of America having commenced this action seeking to reduce to judgment certain Federal income tax assessments against defendant Frances Wynshaw in the amount of $9,619.64 for the tax year ending December 31, 1972, and plaintiff and defendant having filed respective motions for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil

Procedure on the ground that there is no genuine issue as to any material fact, and this Court having issued its Memorandum Order dated June 29, 1981 finding plaintiff is entitled to summary judgment, now, on all the papers and pleadings filed herein, and for the reasons stated in the above Memorandum Order, it is hereby

ORDERED, ADJUDGED AND DECREED that the United States of America have judgment against defendant Frances Wynshaw in the amount of $17,766.36 together with its costs and disbursements in this action and that the United States have execution thereof.

Dated: New York, New York
July 15, 1982

/S/ John M. Cannella
United States District Judge

Judgment entered this
16th day of July 1982

/S/ Raymond F. Burghardt

RAYMOND F. BURGHARDT

Clerk of the Court

Office - Supreme Court, U.S.
FILED
AUG 10 1983
ALEXANDER L. STEVAS

No. 82-1965

In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANCES WYNSHAW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1965

FRANCES WYNSHAW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision of the court of appeals affirming a federal income tax assessment against her in the amount of $9,619.64.

1. a. In October 1973, a joint federal income tax return for the calendar year 1972, purportedly signed by petitioner and her then husband, David Wynshaw, was filed with the Internal Revenue Service (Pet. App. 21, 25). That return reported an outstanding tax liability of $10,368.65; however, no payment was enclosed with the return (*id.* at 21).[1] On January 7,

[1] The disparity between this $10,368.65 figure and the $9,619.64 claimed by the government is due to certain additional deductions allowed by the Service in recomputing the tax on the 1972 return (Pet. App. 21).

1974, this outstanding amount was assessed against petitioner and her husband on the basis of the joint return (*ibid.*). On October 14, 1976, a statutory notice of deficiency for four tax years, including 1972, was mailed to petitioner and her husband. This notice alleged, *inter alia*, that petitioner and her husband had underreported their 1972 taxable income by more than $117,000 and were thus jointly liable for an additional $76,727 in federal income taxes for that year (*id.* at 21-22).

On January 3, 1977, petitioner and her husband filed a petition with the Tax Court for a redetermination of the asserted deficiencies. Petitioner invoked the "innocent spouse" provision of the Internal Revenue Code, 26 U.S.C. 6013(e) (Pet. App. 22-23). That statute provides relief to a spouse who has signed a joint return but in so signing did not know (and had no reason to know) of any failure to report gross income on the return.[2] The statute, however, does not operate to relieve the "innocent spouse" of the liability actually set forth on the return signed and filed by such "innocent spouse." Consistent with her claim of "innocent spouse" status, petitioner did not allege that the signature on the 1972 return was forged or

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[2] Section 6013(e) of the Code (26 U.S.C.) provides that if "a joint return * * * made * * * for [a] taxable year" fails to report "25 percent of the amount of gross income stated in the return" and "the other spouse establishes that in signing the tax return he or she did not know of, and had no reason to know of, such omission," and "taking into account whether * * * the other spouse significantly benefited directly or indirectly from the items omitted from gross income * * * it is inequitable to hold the other spouse liable for the deficiency," he or she "shall be relieved of liability * * * to the extent that such liability is attributable to such omission from gross income."

in any sense unauthorized, or that the return was not in fact a joint return. To the contrary, she stated (*id.* at 23-24; emphasis added):

> The Petitioner, Frances Wynshaw, was innocent of such omissions, if any, and *in signing the returns* for the years in question had no reason to know of such omissions.

On August 21, 1979, petitioner, her husband and the Commissioner entered into a stipulated decision in the Tax Court. With respect to the 1972 return, the Commissioner conceded that petitioner was not liable for any "deficiencies," *i.e.*, any tax liability over and above that shown on the joint return for 1972. In addition, David Wynshaw stipulated that he was liable for the full amount of the deficiency and for the fraud penalty (Pet. App. 24). The liability under this stipulation was calculated on the same basis as that on which the return had been filed, *viz.*, married taxpayers filing a joint return (*id.* at 27).

b. The government filed suit in the United States District Court for the Southern District of New York on January 2, 1980, to reduce to judgment the assessments against petitioner's husband pursuant to the decision of the Tax Court and to reduce to judgment the January 7, 1974, assessment against petitioner and her husband jointly on the basis of the liability shown on the 1972 return as filed, which had never been paid (*id.* at 24). Petitioner contended that she was not liable for the 1974 assessment on the ground that the signature on the 1972 tax return was not hers and had not been authorized. The district court granted the government's motion for summary judgment (Pet. App. 31-45; 516 F. Supp. 785). The court concluded that the Tax Court's acceptance of the 1979

stipulation was a judgment deciding the " 'entire gamut of possible issues that [control] the determination of the amount of tax liability for the year in question' " (Pet. App. 42-44; citation omitted).

Although it disagreed with the district court's analysis, the court of appeals affirmed on other grounds (Pet. App. 19-28; 697 F.2d 85). The court held that the doctrine of equitable estoppel precluded petitioner from disputing her liability (Pet. App. 26). The court explained that the Tax Court judgment in favor of the government was lower than it would have been had petitioner asserted in the first instance that she never signed the 1972 return, because the government relied on petitioner's statement that she had signed the return and thus treated the return as a joint return, resulting in less tax (*id.* at 27-28).

Petitioner filed a petition for rehearing contending that she had additional evidence to submit to show that, prior to the termination of the Tax Court proceeding, her attorneys had informed an attorney representing the Commissioner of their doubts that the signature on the 1972 return was actually hers. Together with her petition for rehearing, petitioner filed a motion for leave to file affidavits to this effect. The court of appeals denied both petitioner's post-decisional motion and her petition for rehearing (Pet. App. 15-18).

2. Petitioner contends (Pet. 11-13b) that the court of appeals erred in denying the post-decisional motion and her petition for rehearing. This contention is without merit. The court of appeals' decision is correct, and no issue is presented that warrants review by this Court.

As the court of appeals held (Pet. App. 26), petitioner is estopped from contending that she did not

sign the 1972 tax return. In tax cases, the doctrine of estoppel applies when "[t]he taxpayer, by his conduct, which includes language, acts or silence[,] knowingly makes a representation or conceals material facts which he intends or expects will be acted upon by taxing officials in determining his tax." *Robinson* v. *Commissioner*, 100 F.2d 847, 849 (6th Cir.), cert. denied, 308 U.S. 567 (1939); cf. *Stearns Co.* v. *United States*, 291 U.S. 54, 61-62 (1934).[3] These criteria are fully satisfied in this case.

In accepting petitioner's "innocent spouse" defense in 1977, the Commissioner clearly relied on petitioner's 1977 statement that she had signed the 1972 return. In computing her husband's tax liability for 1972, the Service calculated the liability on the tax rates for married individuals filing jointly, the same rates used on the return filed for that year. If the tax computation had been based upon the rates for married individuals filing separately, as would have been proper if petitioner had not signed or authorized the return, the Tax Court decision, including fraud penalties, would have been greater than that computed. Compare Section 1(a) with Section 1(d) of the Internal Revenue Code of 1954 (26 U.S.C., 1970 ed.); see Pet. App. 27-28. Thus, even if it is true,

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[3] This Court noted in *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895):

> It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

as petitioner now claims, that she did not sign the 1972 return, she made a material representation of fact in her 1977 petition upon which the Commissioner relied to his detriment. Furthermore, the fact that her attorneys might have stated to government attorneys that the signature on the return might not have been hers does not alter the overriding fact that she expressly alleged the opposite in her formal pleadings during the Tax Court proceedings, and that the Tax Court's decision was based on that representation. Accordingly, the court of appeals correctly affirmed the judgment of the district court and denied her petition for rehearing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1983

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